SUPREME COURT, U. S.
FILED
MAY 26 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1550

GENE McFERRIN,

Petitioner,

versus

THE LUBBOCK NATIONAL BANK,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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William A. Clifford
BLANCHARD, CLIFFORD & SIMS
1607 Broadway
Lubbock, Texas 79401

ATTORNEYS FOR PETITIONER

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971

No.

GENE McFERRIN,

Petitioner,

versus

THE LUBBOCK NATIONAL BANK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, above named, respectfully prays that a Writ of Certiorari issue to review the judgment rendered without written opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding.

OPINION BELOW

The Fifth Circuit Court's opinion, omitting the caption, is in words and figures as follows, to-wit:

"Appeal from the United States District Court
for the Northern District of Texas

(March 21, 1972)

Before BELL, DYER and CLARK,
Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1] Judgment was entered for the bank in a suit on a note. A counterclaim and third party complaint are pending in the district court and this appeal was allowed under Rule 54(b) F.R.Civ.P. There was no error in the grant of summary judgment for the bank."

The Order denying Petition for Rehearing is re-printed and attached as Appendix "A."

The Memorandum Opinion and Judgment of the United States Court for the Northern District of Texas, is re-printed and attached as Appendix "B."

JURISDICTION

The Fifth Circuit Court of Appeals' judgment was entered on the 21st day of March, 1972. A timely Petition for Rehearing was denied on April 17, 1972. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

(1) The Court erred in relying upon the Affidavits of the Bank's executives, which were based upon hear-

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[1]See NLRB v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966.

say, conclusions of fact, interpretation of legal effects of contested instruments and testimony as to matters of which they had no personal knowledge, made.

(2) The Court erred in holding, as a matter of law, that this Note was a demand note.

(3) The Court erred in holding that the Counterclaim and Third Party Claim of GENE McFERRIN, failed to allege any affirmative defenses.

(4) The Trial Court erred in weighing the contents of the pleadings, affidavits, interrogatories and exhibits and using such evidence in determining questions of law.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States, Section 1, is as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The opinion of the Circuit Court denies due process of law to the Petitioner and a basic and fundamental civil right to have the benefit of a decision based upon judicial reasoning under law and not per curiam notation based upon a rule of the court designed only for the benefit of the Court to expedite handling of cases before it.

To affirm without an opinion and merely refer to Local Rule 21 is a denial of a basic civil right and due process of law, not under rule of law, but under rule of court.

Article 1, Section 1, of the Constitution of the United States is as follows:

> "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Rule 19 of the Rules of the Supreme Court of the United States, effective July 1, 1970.

Local Rule 21 of the United States Court of Appeals, Fifth Circuit, is reprinted and attached as Appendix "C."

STATEMENT OF THE CASE

This is an appeal from a final judgment granting a summary judgment to the LUBBOCK NATIONAL BANK against GENE McFERRIN for $101,413.45, principal and interest to date in the amount of $3,676.51,

and court costs. The judgment denied the motion for summary judgment by the LUBBOCK NATIONAL BANK against GENE McFERRIN upon his Counterclaim against the LUBBOCK NATIONAL BANK and expressly refused to make any finding on the cross-action of GENE McFERRIN over and against TRANS PLAINS GENERAL INSURANCE AGENCY, INC., and expressly provided that no finding would be binding upon any fact issue between the parties upon the cross-action or counterclaim of GENE McFERRIN against LUBBOCK NATIONAL BANK and TRANS PLAINS GENERAL INSURANCE AGENCY, INC., and severed these issues for separate trial set for November, 1972. It is from this final judgment that GENE McFERRIN has filed this appeal.

The LUBBOCK NATIONAL BANK sued GENE McFERRIN on a promissory note made and executed by TRANS PLAINS GENERAL INSURANCE AGENCY, INC. and GENE McFERRIN in the original sum of $200,000.00, dated April 24, 1970, which note provided that it was payable on demand, or if no demand, then in 48 monthly installments of $5,024.60, each, and bearing interest at the rate of 9.5% per annum. The Bank alleged the note was a joint and several obligation, reserved all causes of action it had against TRANS PLAINS GENERAL INSURANCE AGENCY, INC., but did not make it a party to this suit. In addition, the Bank alleged that the note was secured by a Security Agreement and Pledge of even date of the note granting it a security interest in certain property, including a Certificate of Deposit in the sum of $50,000.00, and a Stock Certificate in Western States Adjustment Bureau, Inc., and Trans Plains General Insurance A-

gency, Inc. It is here to be noted that the original complaint did not attach a copy of the note or security agreement.

The Bank further admitted that the payments were made upon such note in monthly installments and reduced the principal to $151,413.75, when the Bank made demand for the balance on March 9, 1971. When the balance was not paid, the Bank, before suit, cashed the Certificate of Deposit in the amount of $50,000.00, and allegedly applied the proceeds, less interest, on the unpaid balance of the note, leaving a principal balance of $101,413.75. The accrued interest in the amount of $788.61 was alleged to have been applied to the accrued interest due on the note. In its amended complaint, the Bank asked to foreclose some of the remaining security it holds, but not on the surplus debenture and stocks of TRANS PLAINS INSURANCE COMPANY.

The Defendant, GENE McFERRIN, filed his Answer and Counterclaim against the Bank alleging payments were made upon the installment promissory note in accordance with the express terms of said note and that the note was current when demand was made and no payments were due upon such note until May 10, 1971, and that this action was commenced on April 14, 1971. The Defendant further alleged that at no time was he, under the terms and provisions of the written agreements and/or modifications thereof, in default on such installment note and the Bank neglected and refused to offset funds on deposit by his Co-maker against the note balance and intentionally allowed said funds to be dissipated, knowingly and in collusion with

others, jeopardizing and releasing the co-maker, TRANS PLAINS GENERAL INSURANCE AGENCY, INC. from its obligation on the note in question. It was further alleged that the Bank unlawfully cashed the $50,000.00 Certificate of Deposit and applied it on such note while allowing TRANS PLAINS GENERAL INSURANCE AGENCY, INC.'S, funds to be released, thus depriving him of the opportunity to have such funds applied to the liquidation of the obligation. Defendant McFERRIN alleged damages in the amount of $175,000.00, for the wrongful litigation on the note which was not in default and for recovery of the $50,000.00 Certificate of Deposit and interest thereon, and court costs and reasonable attorney's fees.

McFERRIN with leave of the Court, filed his Third Party Complaint against TRANS PLAINS GENERAL INSURANCE AGENCY, INC., alleging that if he was liable upon such note, then he was entitled to judgment over against TRANS PLAINS GENERAL INSURANCE AGENCY, INC., for contribution and indemnity and attached a copy of the note in Plaintiff's Original Complaint.

Plaintiff, LUBBOCK NATIONAL BANK, answered the Counterclaim and admitted payments but denied that the note was not in default and filed its Motion for Summary Judgment asking for judgment on its complaint, and judgments denying relief to McFERRIN on his Counterclaim and alternatively for pre-trial Order if fact issues were raised.

With leave of the Court, Plaintiff, LUBBOCK NATIONAL BANK, did, on July 12, 1971, file an Amended

Complaint seeking foreclosure of the collateral alleged it held under a Security Agreement and Pledge which Amended Complaint attached a copy of the Installment Note and Security Agreement Pledge and sought to foreclose its alleged security interest in some, but not all, of the security held by it under the Security Agreement Pledge; but not the Certificate of Deposit or the surplus debentures for TRANS PLAINS INSURANCE COMPANY Stocks.

Defendant, GENE McFERRIN, filed his reply to the Bank's Motion for Summary Judgment, alleging that there were material facts raised by his pleadings, his affidavits, his sworn testimony contained in answers to interrogatories and additionally, setting out that because of the lack of time given by the Court to properly make discovery, this Defendant was denied a substantial legal right to meet and rebutt the allegations and the statements in the affidavits filed by the Plaintiff, LUBBOCK NATIONAL BANK. This Defendant further advised the Court that it had given Third Party Defendant notice under the provisions of Section 3.803, Business Code, V.A.T.S. of Texas asking that it be bound by any action of the Court on the Summary Judgment and praying that the Summary Judgment be denied and that no pre-trial order be required until all parties before the Court could complete preparation and discovery.

Prior to the hearing on the Motion for Summary Judgment, the Third Party, TRANS PLAINS GENERAL INSURANCE AGENCY, INC. filed its Answer denying that it had any joint or several obligation on such note or that GENE McFERRIN was entitled to

any recovery over against it. Third Party did not deny it executed such, but only affirmatively alleged such note to be illegal and unenforceable as to it, because the note, the loan agreement and the stock transfer agreement to which LUBBOCK NATIONAL BANK was a party, was an unauthorized and illegal act prohibited by the laws of tne State of Texas. The defense further alleged that the parties to such agreement and notes were: COOPER-HOROWITZ, INC., HAROLD VERNON, and SAM SARCENELLI, all officers and directors of TRANS PLAINS GENERAL INSURANCE AGENCY, INC, and GENE McFERRIN. The LUBBOCK NATIONAL BANK participated in and accepted and agreed to perform acts, under such agreements, thereby becoming an active party to the entire transaction. Such answer raised further affirmative defenses and fact issues.

The Trial Court granted the Motion for Summary Judgment of LUBBOCK NATIONAL BANK, and the Defendant, GENE McFERRIN, filed his appeal with the United States Court of Appeals, Fifth Circuit. On March 21, 1972, the United States Court of Appeals, Fifth Circuit affirmed the Trial Court's decision without opinion and cited Local Rule 21 and footnoted the *N.L.R.B. v. Amalgamated Clothing Workers of America*, Fifth Circuit 1970, 430 F.2d 966. The Appellant subsequently filed a Motion for Re-hearing with said Court, which was overruled on April 17, 1972, without opinion. On April 24, 1972, the Appellant filed an Application for Stay of Mandate until this Application for Writ of Certiorari could be passed upon.

The above facts are in no manner intended to be a complete statement of the facts in this case, but only a summary of the basic and essential facts leading up to the judgment.

LOCAL RULE 21 OF THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

(This Rule is re-printed and attached as Appendix "C")

It should be noted that such Court Rule, not a rule of law, permits the affirmance of a judgment without the necessity of a written opinion thereby causing the Petitioner to not only examine Rule 21, but also to search the cases cited thereunder and its background in order to determine which part of said Rule is applicable to the Petitioner's case. It should be further noted that many cases fall into more than one of the four listed categories or factors contained in such Rule. We feel that to permit an appeal to be affirmed under Rule 21, without written opinion is contrary to the recognized practice and procedure and is violative of the Petitioner's civil right and due process of law.

The United States Court of Appeals, Fifth Circuit in its invocation of Local Rule 21, footnotes *N.L.R.B. v. Amalgamated Clothing Workers of America*, 5th Cir. 1970, 430 F2d 966, as a basis for rendering a decision without the necessity of a written opinion. Judge Brown, in writing such opinion, sets forth a statistical review of the increased case load, not only of the Court of Appeals for the Fifth Circuit, but of the remainder of the judiciary. Such increases forms not only the

basis for the allowance of Local Rule 21, but also outlines its imposition in any case falling within the four categories or factors outlined therein.

To sacrifice due process for the expediency of judicial workload would be to deprive Petitioner of a basic civil right and the Country of one of its most cherished institutions. Further, to deprive the litigant of an opinion wherein an appeal has been properly brought, at great expense to the Petitioner, and thereby to allow the Circuit Court to pass upon several legal and factual questions which are of grave importance to the Petitioner without the necessity of written opinion operates a grave injustice to all concerned and in particular to the Petitioner. Rule 21 is a judge made rule designed for the convenience of the Court and not a statutory rule of law passed by a duly elected and representative legislative branch of government and approved by a duly elected executive branch of government and thereby has the effect of legislation without representation in violation of the provisions of the Constitution of the United States, Article ONE (1), Section ONE (1).

It is further the contention of the Petitioner, that he was deprived of his civil rights to have the case properly reviewed by the United States Court of Appeals, Fifth Circuit. The Court, through the invocation of Local Rule 21, arbitrarily and discriminatively placed his case within the purview of Local Rule 21 and deprived the Petitioner of his right to a written opinion while in other cases which were before the Court, Local Rule 21 was not so imposed.

RULE 19 OF THE SUPREME COURT OF THE UNITED STATES

The Circuit Court departed from the usual and accepted course of judicial proceedings and is therefore subject to Rule 19 of the Supreme Court of the United States. Rule 19, states in part: "* * * or has so far departed from the accepted and usual course of judicial proceedings, or are so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision."

It is the Petitioner's contention that such departure from the accepted and usual course of judicial procedure renders an appeal a nullity and that the imposition of Local Rule 21 serves not to diminish the judicial case load as originally believed, but in reality increases it since it necessitates that all original points of error must be raised anew in the Supreme Court of the United States to have a judicial determination.

That based on such Rule, the Supreme Court should exercise its power of supervision and hold that the Petitioner herein is entitled to a written opinion from the United States Court of Appeals, Fifth Circuit on the important legal and factual questions raised by this appeal.

CONCLUSION

Therefore, based upon Section 1, Article 1 of the United States Constitution, and the Fourteenth Amendment to the Constitution of the United States, Section 1 and Rule 19 of the Rules of the Supreme Court,

we feel that Local Rule 21, deprives the Petitioner of his right to due process of law and a Writ of Certiorari should be issued. In conclusion, we must earnestly and respectfully urge this Court to grant Certiorari and review this case and reverse the decision of affirmance of Local Rule 21, arbitrarily and discriminatively and to order the Trial Court to grant a new trial or to render judgment for the Petitioner herein.

Respectfully submitted,

BLANCHARD, CLIFFORD
& SIMS
1607 Broadway
Lubbock, Texas 79401

Wm. A. Clifford
ATTORNEYS FOR
PETITIONER

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

EDWARD W. WADSWORTH
Clerk

Room 408-400 Royal St.
New Orleans, La. 70130
(504) 527-6514

April 17, 1972

TO ALL PARTIES LISTED BELOW

Re: No. 71-3200 — The Lubbock National Bank vs. Gene McFerrin

Gentleman:

You are hereby advised that the Court has today entered an order denying the Petition ( ) for Rehearing in the above case. No opinion was rendered in connection therewith. See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH,
Clerk

(Signed) ALVIS M. WINCHESTER
Deputy Clerk

/amw
cc: Mr. William A. Clifford
Mr. Jan Fouts
Mr. Aubrey J. Fouts

APPENDIX "B"

MEMORANDUM OPINION

Filed: AUG. 24, 1971

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

THE LUBBOCK NATIONAL BANK,
Plaintiff,

versus

CIVIL ACTION
No. 5-899

GENE McFERRIN,
Defendant.

Plaintiff bank asserts a cause of action for the balance due and owing on one promissory note signed by Gene McFerrin and Trans Plains General Insurance Agency, Inc., dated April 24, 1970, in the amount of $200,000.00, payable to the order of The Lubbock National Bank and providing that it was due "on demand, or if no demand is made, then as follows:" and then providing for monthly installments. Defendant McFerrin filed his counterclaim against the bank alleging 12 monthly payments which the bank acknowledged in its complaint, and further alleging that the co-maker of the note, Trans Plains General Insurance Agency, Inc., had on deposit with the bank large sums

of money which the bank should have used as an offset to the note, but that through gross neglect, and in collusion with others, the bank transferred the funds to others with the intention of wilfully jeopardizing the security of McFerrin. McFerrin then prays for $225,000.00 damages against the bank for conversion and for wrongfully bringing suit upon such note, which note he alleges was never in default or all monthly payments called for, in the absence of a demand, were paid through April 10, 1971.

McFerrin has, in a third party action, filed his complaint against the co-maker of the note, but this particular action is not involved here. The bank has filed a motion for summary judgment in its behalf on its original complaint and on McFerrin's counterclaim, supporting such motion by the defendant's answers to interrogatories and other affidavits. McFerrin has also filed his affidavit in connection with his opposition to plaintiff's motion.

The following facts appear to be established and uncontradicted from McFerrin's answer to interrogatories and his own affidavit:

McFerrin executed the note sued upon and the security agreement-pledge which secured the note (Int. Nos. 13 and 14). He also acknowledges that a letter of demand for full payment of the note which was attached to the interrogatories, was addressed to his correct mailing address, although he does not recall when he first saw the letter. (Int. Nos. 11 and 12).

The affidavit of Mr. McFerrin was filed in this Court on August 6, 1971, and several documents were attached thereto. Although the affidavit contains many statements which are conclusions only, there are certain facts in the affidavit and attachments which are material. Exhibit "A" shows that the $200,000.00 proceeds from the loan were to be used by paying $100,000.00 to Harold Vernon et al for the purchase of at least 95% of the capital stock in the corporation which was a co-maker of the note and the other $100,000.00 was to be used to purchase a certificate of deposit as collateral for the note, together with such capital stock. The note was to be a demand note, or if no demand was made, then in monthly installments. (Par. I, p. 2 of Ex. A to such affidavit). The Trans Plains General Insurance Agency, Inc. was to purchase 75,577 shares of stock in Trans Plains Insurance Company, which owned all of Trans Plains Casualty Co. (Ex. B to affidavit.) This exhibit shows the consideration for these transactions to be a $650,000.00 note, and it does not appear that any of the plaintiff's $200,000.00 loan to McFerrin was used in connection with the stock purchases shown by such Exhibit B. McFerrin's affidavit and Exhibits "P", "Q", "R", and "S" attached thereto show large sums of money on deposit with the plaintiff to the credit of the co-maker during the critical periods involved in this suit.

McFerrin also showed in his affidavit that, as early as September 15, 1970, Trans Plains General Insurance Agency, Inc. was under voluntary supervision, the bank knew of same, and was fully aware of such financial condition (p. 8 of affidavit), and that receivership proceedings culminated. (P. 9 of affida-

vit.) In his affidavit McFerrin acknowledged that the funds of Trans Plains General Insurance Agency, Inc., were transferred by the bank to the State Insurance Board of Texas (Int. No. 33), and that all of the related companies were put under supervision by such regulatory body on or about September 20, 1970. (Int. Nos. 19-23, inclusive.) In June of 1970 the $100,000.00 certificate of deposit was released as security, cashed and given to Trans Plains Casualty Company to satisfy the State Insurance Board, and McFerrin purchased another $50,000.00 certificate of deposit as security. (Int. Nos. 43-46 inclusive.)

McFerrin's affidavit and answers name the officers of the bank whom he alleges failed and neglected to apply the agency's deposits as a credit on the note, at a time when they knew all of the companies were having financial difficulties, and that such acts caused the burden of the payment of the note to fall on him, not the co-maker.

McFerrin does not deny under oath that demand was made upon him to pay the note prior to the filing of the suit, but in fact he more or less acknowledges that he might have received one of the demands. (Int. Nos. 11 and 12.) However, two affidavits filed by the plaintiff conclusively, and without sworn denial, show that a sufficient demand was made by the plaintiff to accrue a cause of action for the balance due. (Affidavit of Mr. Conner dated August 5, 1971, and of Mr. Key dated June 30, 1971.)

The amount of the payments made and the balance of the $200,000.00 note as of the date of the last payment

and the application of the $50,000.00 certificate of deposit as a credit are not in dispute.

The above, together with all of the other controverted affidavits and exhibits filed in support of and against the motion for summary judgment, show without any dispute or contradiction that the note was duly executed, the consideration was paid to or for the benefit of the makers, a demand was made for payment of the balance, and which demand has not been met.

The plaintiff bank has the right to file its complaint and assert its cause of action against only one of the co-makers of a promissory note where the liability is joint and several and it is not necessary that Trans Plains General Insurance Agency, Inc. be a party-defendant to such cause of action. *Swinford v. Allied Finance Co. of Casa View*, 424 S.W.2d 298 (Tex.Civ.App., 1968, err.dism.).

The note sued upon is to be treated as a demand note, *Greiner v. Rogers*, 450 S.W.2d 665 (Tex.Civ.App., 1969) and when demand for payment is made, as was done here, the balance is due and payable, with or without cause. *State Trust & Savings Bank v. Malitz*, 44 S.W.2d 1070, Tex.Civ.App., 1932.

It is not necessary for the bank to have any cause or reason to make such demand for payment on a note such as that involved here (*Exchange Nat'l Bank of Chicago v. Credit Finance Co.*, 203 N.E.2d 58 [App.Ct., Ill., 1964]) although the undisputed facts covering the receivership proceedings do furnish adequate basis for demand being made.

The record shows that all material facts are undisputed and are sufficient to support plaintiff's motion for summary judgment against defendant on its complaint and for the balance due on the $200,000.00 note.

As to whether summary judgment should be granted against defendant on his counterclaim depends, among other things, on whether or not the plaintiff bank had a duty to offset to co-maker's deposit as a credit to the note. Defendant is not in his counterclaim asserting any defenses to the suit on the note itself, but is seeking damages for the wrongful filing of the suit by the bank and conversion.

There may be some dictum authority to the effect that the bank has no duty to use such deposits of a co-maker, and can proceed against the other signer without giving any credits. *Van Winkle Gin & Machine Co. v. Citizens Bank of Buffalo,* 33 S.W. 862 (Tex.Sup. Ct., 1896).

But here, where the defendant in his counterclaim alleges neglect, failure, and collusion, certain fact issues might be raised. McFerrin's affidavit and answers on these points are merely conclusions in many respects, but the Court is of the opinion that opportunity should be given for the development of these facts on the trial of the case on its merits. Should there be any doubt in regard to whether there are questions of fact, the doubt should be resolved against the party seeking summary judgment. *Heyward v. Public Housing Administration,* 238 F.2d 689 (5th Cir., 1956).

One facet of a necessary fact resolution has not been fully developed. It seems uncontradicted that the proceeds of the note signed by the corporation with defendant as a co-maker were used at least partially to purchase the capital stock of the corporation itself. Undoubtedly the question of the legality of such a loan to the corporation will be raised; but even if illegal as to the corporation, this would not be a defense as to McFerrin who had such stock issued in his name. *Stahlman v. McManus*, 93 S.W. 2d 470, (Tex.Civ.App., 1936); *Francklow v. Ullmann, Stern & Krausse*, 214 S.W. 797, err.ref., (Tex.Civ.App., 1919).

If in fact it is determined that the corporation's act in executing this note made same uncollectible as against the corporation, then this would have a direct bearing not only on the duty but even the right of the corporation to offset such deposits. However, as indicated above, these facts have not been developed to such an extent that all material issues of fact can be said to be uncontradicted, and these questions of fact, as well as of law, are not decided here.

Further, nothing in the judgment to be entered or of this opinion will be binding or controlling as to any questions of law or fact insofar as they pertain to the liabilities or the rights of third party defendant, Trans Plains General Insurance Agency, Inc., or its successors.

The attorney for the plaintiff will prepare a judgment for the principal and interest due on the note and in its favor. Such judgment shall be final and ap-

pealable under Rule 54(b), Federal Rules of Civil Procedure, as there is no just reason for a delay.

The bank's motion for summary judgment on the counterclaim against it by Gene McFerrin is here denied.

The Clerk will furnish a copy hereof to each attorney.

ENTERED this 24th day of August, 1971.

(Signed) HALBERT O. WOODWARD
HALBERT O. WOODWARD
United States District Judge.

JUDGMENT

Filed: AUG. 25, 1971

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

THE LUBBOCK NATIONAL BANK,
Plaintiff,

versus

CIVIL ACTION
No. 5-899

GENE McFERRIN,
Defendant.

The Motion for Summary Judgment of The Lubbock National Bank came on to be considered in the above

styled and numbered cause, and the Court having considered the pleadings, affidavits, interrogatories and admissions on file, together with the argument of counsel and the authorities presented by counsel, is of the opinion that the Motion for Summary Judgment of The Lubbock National Bank as to its cause of action against Gene McFerrin should be granted and that such motion should be denied as to the counterclaim of Gene McFerrin against The Lubbock National Bank, and that a separate trial should be ordered as to such counterclaim and the cross-action of the Defendant, Gene McFerrin, against Trans Plains General Insurance Agency, Inc., it is

ORDERED that the Plaintiff's Motion for Summary Judgment as to its cause of action against Gene McFerrin is hereby granted and it is accordingly ORDERED, ADJUDGED, and DECREED that The Lubbock National Bank do have and recover judgment of and from the Defendant, Gene McFerrin, in the amount of $101,413.75, principal, interest to date in the amount of $3,676.51, and all costs of Court in this behalf expended.

It is further ORDERED that this Judgment shall bear interest at the rate of six percent per annum from date until paid, and the Court expressly determines that there is no just reason for delay in the entry of final judgment, and hereby expressly directs the entry of final judgment as to the cause of action of The Lubbock National Bank against Defendant, Gene McFerrin.

It is further expressly ORDERED that nothing in this judgment shall affect the rights or liabilities of Trans Plains General Insurance Agency, Inc., and the Court expressly makes no finding herein concerning any issue involved in any cause of action which may exist between The Lubbock National Bank and Trans Plains General Insurance Agency, Inc., or in connection with the cross-action of Gene McFerrin against Trans Plains General Insurance Agency, Inc.

It is further ORDERED that the Motion for Summary Judgment of The Lubbock National Bank as to the counterclaim of Gene McFerrin against The Lubbock National Bank be and the same is hereby overruled.

It is ORDERED that a separate trial, in accordance with Rule 42B of the Federal Rules of Civil Procedure, be ordered on the counterclaim of Gene McFerrin against The Lubbock National Bank and the cross-action of Gene McFerrin against Trans Plains General Insurance Agency, Inc., from the cause of action of The Lubbock National Bank against Gene McFerrin upon which final judgment is here ordered.

DATED: August 25, 1971.

(Signed) HALBERT O. WOODWARD
Judge, United States District Court, Northern District of Texas, Lubbock Division

APPENDIX "C"

RULE 21
AFFIRMANCE WITHOUT OPINION

When the court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision: (1) that a judgment of the district court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury order is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) that no error of law appears; and the court also determines that an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

In such case, the court may in its discretion enter either of the following orders: "AFFIRMED. See Local Rule 21," or "ENFORCED. See Local Rule 21."

APPENDIX "D"

NOTICE OF APPEAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

THE LUBBOCK NATIONAL BANK,
Plaintiff,

versus

CIVIL ACTION
No. 5-899

GENE McFERRIN,
Defendant.

Notice is hereby given that GENE McFERRIN, Defendant named above, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on the 25th day of August, 1971.

/s/ Wm. A. Clifford
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